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No. 92-1795

In the Supreme Court of the United States

OCTOBER TERM, 1993

NICHOLAS ALFRED RATTENNI AND
A-1 COMPACTION, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in admitting at trial statements of petitioners' co-conspirators.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is unreported, but the judgment is noted at 990 F.2d 1250 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1993. The petition for a writ of certiorari was filed on May 11, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to commit bribery, in violation of 18 U.S.C. 371, and bribery, in violation of 18 U.S.C. 666. Nicholas Rattenni was sentenced to four months' imprisonment, to be followed by four months' home confinement and two years' supervised release, and was fined $20,000. A-1 Compaction, Inc., was fined $40,000. The court of appeals affirmed. Pet. App. A1-A7; Gov't C.A. Br. 2.

1. Nicholas Rattenni is the president and owner of A-1 Compaction, Inc., a garbage hauling company. Peter Hargrove is a senior A-1 employee whom Rattenni had authorized to draw checks on the company's account. Between 1986 and 1990, Hargrove delivered liquor, hams, tires, and other merchandise to New York state troopers. Those items were distributed on the understanding that troopers who stopped A-1 trucks for violations of state truck weight regulations would understate the amount by which the trucks were overweight and would write tickets for the smaller amounts. Pet. App. A2-A3; Gov't C.A. Br. 3-8.

2. At petitioners' trial, the government introduced several out-of-court statements made by Hargrove and by Henry Leake, a trooper who accepted bribes from Hargrove and who began cooperating with the government during the course of the conspiracy. Those statements showed that Rattenni knew about and participated in the bribery scheme. First, Leake stated during an FBI interview that when Hargrove initially offered Leake merchandise in 1986, Hargrove said, "My boss wants to drop off some booze for

Christmas for you guys." Second, Hargrove told Leake in a recorded conversation that Rattenni was interested in the reinstatement of a suspended state trooper who was the son of an A-1 customer. Third, Hargrove stated in another recorded conversation that he had told Rattenni that Leake was interested in employment with A-1 and also stated that Rattenni knew of Leake as "this guy that does all these things for us" and knew that Hargrove had supplied Leake with a vehicle engine at a substantial discount. Fourth, Hargrove asked Leake to inquire about a speeding ticket received by Rattenni's stepson. Leake eventually gave Hargrove a copy of a police report on the stepson's driving record. The report was later found on Rattenni's desk. Finally, after his arrest, Hargrove stated that he was "looking out for the interests of a third party." Pet. App. A3; Gov't C.A. Br. 3-11.

3. The court of appeals affirmed petitioners' convictions, rejecting their claim that the statements by Hargrove and Leake were improperly admitted under the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). The court first observed that Hargrove's statements concerning the suspended trooper, Leake's retirement, and the speeding ticket were not hearsay, because they "were not offered for their truth, but to show Rattenni's knowledge of the relationship between Hargrove and Leake." Pet. App. A5. The court of appeals then concluded that to the extent that any of the statements were offered for their truth, the district court properly admitted them under Rule 801(d)(2)(E). Pet. App. A5-A6. The court noted that independent evidence, apart from those statements, supported a finding that Rattenni participated in a conspiracy.

Specifically, the court identified the presence on Rattenni's desk of the police report Hargrove had obtained from Leake and the fact that Rattenni had given Hargrove unrestricted access to A-1 funds. Pet. App. A6. The court concluded that "[a]dding to this extrinsic evidence the content of the statements themselves, * * * the District Court was not clearly erroneous in finding by a preponderance of the evidence that Rattenni had been a member of the conspiracy." *Ibid.*[1]

ARGUMENT

A co-conspirator's out-of-court statement is admissible at trial under Federal Rule of Evidence 801(d)(2)(E) if the government shows by a preponderance of the evidence that a conspiracy existed between the declarant and the defendant and that the statement was made during the course of, and in furtherance of, the conspiracy. *Bourjaily* v. *United States*, 483 U.S. 171, 175 (1987). In determining whether a conspiracy existed and whether the defendant took part in the conspiracy, the district court

[1] The court of appeals also rejected petitioners' claims regarding the sufficiency of the evidence, alleged prosecutorial misconduct, and the district court's refusal to order a new trial. Pet. App. A4-A7. The court of appeals ruled that the district court erred in admitting Hargrove's post-arrest statement that he had been protecting the interests of a third party, concluding that the statement was not made in furtherance of or during the course of the conspiracy. *Id.* at A6. The court concluded, however, that in light of the fact that "Rattenni was identified by name in several of Hargrove's properly admitted statements," the erroneous admission of one additional statement containing an "oblique reference" to a third party was harmless. *Ibid.*

may evaluate all non-privileged evidence, including the statement sought to be admitted. *Id.* at 176-181.

The court of appeals correctly concluded that the government made an adequate showing that Rattenni participated in a conspiracy. The statements themselves strongly suggested that Rattenni knew of and directed the bribery scheme. In addition, as the court of appeals observed, independent evidence supported the finding that Rattenni was a member of the conspiracy. As the president and owner of A-1, Rattenni directly benefited from the practice of bribing troopers to give A-1 favorable treatment. The presence on Rattenni's desk of the police report Leake obtained for Hargrove provided additional support for the inference that Rattenni knew of Hargrove's contacts with Leake, and the evidence that Rattenni gave Hargrove unrestricted access to A-1 funds suggested that Rattenni facilitated the scheme by making company funds available to Hargrove. In sum, the court of appeals correctly held that the district court did not err in finding that Rattenni participated in the conspiracy. Further review of that factbound question is not warranted.

Petitioners contend (Pet. 10-14) that this Court should review an issue left open in *Bourjaily*: whether a district court may rely solely on the substance of a co-conspirator's out-of-court statements to determine the admissibility of those statements under Rule 801(d)(2)(E). See *Bourjaily*, 483 U.S. at 181. Because the government did not rely on the co-conspirator statements alone to establish Rattenni's involvement in the conspiracy to bribe state troopers, the court of appeals did not address the question on which petitioners seek review. See Gov't C.A. Br. 20-23. Instead, the court held that the proffered state-

ments and the extrinsic evidence, taken together, were sufficient to show that Rattenni participated in the conspiracy. See Pet. App. A6. Thus, the question left open in *Bourjaily* is not presented here.

Petitioners contend (Pet. 12) that the court of appeals' unpublished decision in this case conflicts with *United States* v. *Silverman*, 861 F.2d 571 (9th Cir. 1988), and *United States* v. *Washington*, 952 F.2d 1402 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1773 (1992). Contrary to petitioners' suggestion, the Ninth Circuit did not hold in *Silverman* that Rule 801(d)(2)(E) requires a district court to evaluate the extrinsic evidence separately to determine whether it establishes the defendant's participation in the alleged conspiracy. Instead, that court concluded on the facts before it that "when the additional evidence is assessed in light of [the co-conspirator] statements, a preponderance of the evidence fails to demonstrate that [the defendant] knew of and participated in the alleged conspiracy." 861 F.2d at 580. The court also stated that evidence used to support the admission of co-conspirator statements must be "fairly incriminating," *id.* at 578, but it is not clear that the evidence at petitioners' trial would fail to satisfy that description. See Pet. App. A5-A6.[2]

Petitioners' reliance on *United States* v. *Washington*, *supra*, is also misplaced. In that case, the court

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[2] The court of appeals observed that "the Ninth Circuit has indicated that the extrinsic evidence must be 'fairly incriminating' since the co-conspirator's statement itself is presumptively unreliable, see *United States v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988)." Pet. App. A5. Nevertheless, the court of appeals found it unnecessary to "require the District Court to weigh the extrinsic evidence independently of the co-conspirator statements." *Ibid.*

merely held that even if a defendant is not charged with conspiracy, out-of-court statements may be admitted under Rule 801(d)(2)(E) if there is "substantial evidence independent of the statements" to support a finding that a conspiracy existed between the defendant and the declarant. 952 F.2d at 1407. In this case, Rattenni and A-1 were charged with conspiring to bribe state troopers, and *Washington* accordingly is inapposite. The court of appeals correctly found that there was sufficient evidence—including evidence independent of the co-conspirator statements—to establish that Rattenni participated in that conspiracy. There is no reason to believe that the District of Columbia Circuit would have reached a different result.[3]

[3] Petitioners also contend (Pet. 12 n.9) that the court of appeals' decision "implicitly contradict[s]" the decision in *United States* v. *Daly*, 842 F.2d 1380 (2d Cir.), cert. denied, 488 U.S. 821 (1988). That claim is mistaken. In *Daly*, the Second Circuit employed the same approach to co-conspirator statements that it followed in this case, evaluating the proffered statements "in light of independent corroborating evidence." 842 F.2d at 1386. In any event, petitioners' claim of an intra-circuit conflict does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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